

The Kilwa Appeal - A Travesty of Justice

5 May 2008

1. The Verdict of the Military Court of Katanga

The Kilwa trial, which opened before a military court in December 2006, concerned a massacre in October 2004 in which at least 73 civilians were killed by soldiers of the 62nd Brigade of the Congolese Armed Forces, with logistical support from the Australian/Canadian mining company, Anvil Mining. Anvil Mining has stated that its transport and equipment were requisitioned and that it had no choice in the matter.

On 28 June 2007, the court in Lubumbashi acquitted all those accused of war crimes and other crimes in relation to the Kilwa events. The court ruled *inter alia* that the majority of those who had died had been members of a rebel group killed in confrontations with the Congolese Armed Forces. The court did not accept that the military had carried out extrajudicial executions or that some the victims had been buried in unmarked graves in Nsensele. The court ruled that the site indicated by numerous witnesses and UN human rights investigators was a cemetery, not a mass grave, and that Anvil Mining's vehicles and logistical support had been requisitioned. The court acquitted not only the three employees of Anvil Mining who were on trial, but also Anvil Mining the company, even though, at the beginning of the trial, the charges against the corporate entity had been dropped.ⁱ The Commanding officer of the 62nd Brigade, Colonel Ademar Ilunga, and another soldier were convicted for the torture and murder of two students from the garrison town of Pweto and sentenced to life imprisonment; these crimes were unrelated to the events in Kilwa.

Louise Arbour, the United Nations High Commissioner for Human Rights, issued a statement expressing her disquiet about the verdict.ⁱⁱ She stated: "I am concerned at the court's conclusions that the events in Kilwa were the accidental results of fighting, despite the presence at the trial of substantial eye-witness testimony and material evidence pointing to the commission of serious and deliberate human rights violations". She also condemned the use of a military court to try civilians. It took several months, and numerous requests, before the victims' lawyers were able to have access to the written judgement.

2. The "Double Appeal"

Immediately after the verdict was read out in court, on 28 June 2007, Major Ndaka, the assistant military prosecutor, lodged a general appeal (*sur le banc*) against the judgement, as did the main defendant, Colonel Ademar Ilunga, who had been

sentenced to life imprisonment for crimes committed Pweto. The 144 *parties civiles* also lodged appeals. The original military prosecutor's appeal (*acte d'appel*) was formally registered by the Clerk of the Court in Katanga. On 3 July 2007, another military prosecutor, Lieutenant Colonel Kasongo Kyolwele, who had not participated in the first trial, lodged a second appeal restricting the grounds to the life sentence imposed on Colonel Ademar Ilunga. This second appeal, which was conveyed in a simple letter to the President of the High Military Court (*Haute Cour Militaire*), was not formally registered by the Clerk of the Court in Katanga. Under the military justice system, a general appeal would normally have required the appeals court to reconsider all the evidence and hear witnesses. The second appeal therefore effectively blocked a review of the case and the Kilwa victims' only chance of obtaining redress. The lawyers representing the *parties civiles* were only informed about this second, restrictive appeal when the hearings started in December 2007. Anvil Mining, on the other hand, appears to have been fully informed about the second appeal well before the start of the proceedings: the company informed Global Witness in late November 2007 that the appeal did not concern Anvil Mining.

3. Continued Political Interference in the Appeal Process

In September 2007, Leandro Despouy, the United Nations Special Rapporteur on the Independence of Judges and Lawyers, wrote to the Congolese Government to express concern about impunity and increasing interference in the independence of the military courts.ⁱⁱⁱ He referred to the Kilwa trial and the acquittal of all the accused, "despite the weight of evidence, including eye-witness testimony, which indicated clear responsibilities for the tragic events". He continued:

Furthermore, it seems to me that the independence of the judges was not respected in this trial. The military prosecutor who carried out the investigation, formulated the charges and presented the case for prosecution to the judges, was recalled to Kinshasa and reassigned to Kananga while the trial was still underway. The irregularities in this trial were so blatant that the High Commissioner for Human Rights, Mrs Louise Arbour, published a press release condemning the verdict. Given that the military prosecutor has lodged an appeal, it is now of the utmost importance that the appeal should be allowed to proceed fairly and that the judges concerned should be able to reach a decision independently and solely on the basis of applicable law. It is also essential that all the victims and all the witnesses of the massacre be heard by the judges: it seems to me that only by holding hearings in Kilwa itself would it be possible for the judges to hear all the witnesses in order to reach a just and fair verdict.^{iv}

Before the start of the appeal, RAID, Global Witness, ASADHO and ACIDH urged the Congolese authorities to view the appeal as an opportunity to rectify the injustices and errors which had been committed in the first trial and to restore faith in the independence of the Congolese judiciary.^v In the Democratic Republic of Congo, a hearing before the military court of appeal would normally be heard in the capital Kinshasa. Unusually, in the Kilwa case, the military judicial authorities announced that the appeal would be heard in Lubumbashi, capital of Katanga province, under the auspices of the provincial government. This was despite the objections of the NGOs, who had expressed concern about possible further political interference in the

proceedings. In view of the court's verdict that all the deaths were either accidental or the result of armed confrontations, the NGOs also called for a full independent forensic examination of the bodies of the victims of the Kilwa massacre to be carried out with international assistance. These concerns and the recommendations of the Special Rapporteur were disregarded by the Congolese authorities.

However, it is unclear from the experience of the first trial whether holding the appeal in Kilwa would necessarily have resulted in a greater number of witnesses being heard. On a visit to Kilwa in March 2008, RAID and ACIDH were told by one of the victims how during the Kilwa hearings, the judges had refused to allow him and other families of victims to testify, claiming that they were "tired" of hearing the same story from witnesses. When he and the others protested, the police present in the makeshift courtroom threatened to shoot them.^{vi}

4. The Kilwa Appeal: *Dossier crimes de Kilwa, RPA 017/07 MP C/Ilunga Ademar*

The victims' lawyers have highlighted a number of concerns about irregularities in the appeal proceedings which opened in Lubumbashi on 5 December 2007:^{vii}

- The *parties civiles* were not properly notified before the start of the appeal.^{viii}
- The victims' lawyers were unable to obtain a copy of the case-file in advance of the hearings because the court registrar kept it in his private hotel room.
- The court summarily rejected the appeals lodged by all the *parties civiles* and upheld the acquittal of the three Anvil Mining employees in a hearing on 21 December 2007 that lasted just a few minutes.
- On 29 December 2007 the appeals court refused to allow the *parties civiles* to intervene, allegedly on the grounds that their lawyers were required to obtain new instructions to represent them in the appeal proceedings.
- The appeals court also overruled the victims' lawyers' objections to the second, restrictive appeal and refused to reinstate the first, general appeal.

In a press release, Global Witness and RAID described the decisions of the military court of appeal as the culmination of a pattern of political interference and irregularities designed to protect those responsible for the crimes committed in Kilwa.^{ix}

5. Petition for the Removal of the Appeals Court Judges

On 2 January 2008 an application for the removal (*recusation*) of the appeals court judges was lodged by Paulin Ulimwengu Yekuli. Mr Ulimwengu's two sons had been killed, allegedly by Colonel Ademar Ilunga, on 15 October 2005 and his home looted. The appeal hearings were suspended on 6 January 2008 in order for the application to be considered. The lawyers representing the *parties civiles* called on the President of the High Military Court to replace the appeals court judges and to hold the hearings in Kinshasa, not Lubumbashi where they alleged the case would be subjected to interference from the provincial authorities of Katanga. The victims' lawyers argued that the first appeal, which should have been considered as a general appeal, would have presented many advantages for the interests of the *parties civiles*. Before the application could be considered, however, President Kabila issued a series

of decrees affecting the judiciary (see section 7 below). In a press release, ASADHO outlined its concerns about the conduct of the appeal and the denial of the rights of the victims to participate in the proceedings. ASADHO reiterated the call for the authorities to take all necessary steps to ensure that the proceedings were held in Kinshasa before judges who would guarantee their independence, impartiality and fairness.^x

6. The High Military Court's Rejection of the Petition

At a hearing before the High Military Court in Kinshasa on 22 February 2008, the military prosecutor, commenting on the "double appeal", said that the subsequent appeal had been necessary because the original one had been lodged by an officer, Major Ndaka, whose rank was lower than that of the main defendant, Colonel Ademar Ilunga. In Congolese military proceedings, only prosecutors of the same or higher rank than the accused can intervene. However, the military prosecutor failed to note that the second, restrictive appeal was also lodged by an officer, Lieutenant Colonel Kasongo, of a lower rank than Colonel Ademar. Just before the start of the first trial, Colonel Eddie Nzabi, the military prosecutor who had initially investigated the Kilwa massacre and sent the case to trial, had been abruptly transferred.

The first prosecutor appointed to replace Colonel Nzabi was Lieutenant Colonel Kasongo Kyolwele, who had served as an advisor to Katumba Mwanke when the latter was governor of Katanga (from 1998 to 2001).^{xi} Being of a lower rank than Colonel Ademar, Lieutenant Kasongo was not competent to take over the role of prosecutor: according to Article 67 of the Congolese Code of Military Justice, the military prosecutor and panel of judges must be composed of persons of the same or higher rank as the accused. Just before the court reconvened, another prosecutor, Colonel Shomari Fundi, who had little knowledge of the trial dossier, was assigned to the case, but, unbeknown to the *parties civiles*, he did not formally replace Lieutenant Colonel Kasongo as the chief prosecutor. Major Ndaka, who had previously worked as an assistant prosecutor to Colonel Nzabi, continued working as an assistant to Colonel Shomari throughout the trial. On the day that the appeal was due to be filed, Colonel Shomari was not present, so Major Ndaka filed in his place. According to Congolese legal practice, the assistant prosecutor is authorized to act in the absence of the chief prosecutor. At no time during the original trial proceedings were objections raised in relation to Major Ndaka's rank or his ability to act as an assistant to Colonel Shomari.

On 29 February 2008, the High Military Court rejected the application by the *parties civiles* for the removal of the judges and for the first, general appeal to be the basis for the proceedings. The court fined Paulin Ulimwengu, who had signed the application, 40,000 Congolese Francs (US \$72.73) for presenting a vexatious and frivolous complaint against the judges. The victims' families and NGOs interpreted this penalty as another attempt to dissuade them from taking their claims any further.

7. Increasing Interference in the Functioning of the Judiciary

The tendency of the government to interfere with the independence of the courts was all too apparent when on 9 February 2008, President Joseph Kabila issued a number of decrees (*ordonnances présidentielles*) concerning the restructure of the judiciary.

By means of these decrees, President Kabila ordered the retirement of some judges and appointed replacements in violation of the Congolese Constitution. The President's action is considered unlawful and, at the time of writing, judges are not complying with the decrees. Under Article 150 (indent 4) and Article 152 (indents 3 and 4) of the Congolese Constitution, the competent body for proposing nominations, removals, transfers and retirement of judges is identified as "*le conseil supérieur de la magistrature*" (the Higher Judicial Council). The restructuring, proposed by the Ministry of Justice, was justified in the decrees on the grounds of "urgency" and the fact that it would have been impossible to convene the Council which would be composed only of judges. Under the Constitution it is only Council members who have the competence to make recommendations about judicial appointments. No steps had been taken since the adoption of the Constitution to nominate members of the Council. The executive power's decision to restructure the judiciary unilaterally has been condemned by Congolese and international human rights observers as undermining the independence of the judiciary. No new judges have been appointed and sworn in.

Although in theory, under the Constitution, decisions of the military courts may be overturned by the Supreme Court, this is unlikely to happen in the Kilwa case. There is currently an impasse between the judiciary and the executive and the Supreme Court is at a standstill, unable to organise hearings. But even without the stand-off between the judiciary and the government, the constant obstructions and political interference that have bedevilled the Kilwa case indicate that to all intents and purposes, there are no further legal remedies available to the victims and their families under Congolese law.

8. Further Threats and Obstructions

During the trial, many witnesses and the families of victims were put under pressure not to testify. Adele Farai, whose two sons were killed in Kilwa, reported that members of the security services, who were present in the courtroom, tried to discourage her from appearing as a witness. Several times during the trial, the Kunda family^{xiii} reported that unknown assailants had come to their home in Lubumbashi and banged on the door and roof in an effort to scare them.

The intimidation has not ceased with the end of the legal proceedings. On 1 April 2008, in a clear violation of the right to freedom of movement and of the victims' rights to receive assistance, the Governor of Katanga province, Moïse Katumbi, and the provincial Minister of Interior, Dikanga Kazadi, prohibited lawyers and members of Congolese human rights NGOs from flying to Kilwa. The team planning to visit Kilwa included human rights lawyers Georges Kapiamba and Serge Lukunga, the director of ACIDH, Prince Kumwamba, and Paulin Ulimwengu, the father of two of the victims of the Kilwa massacre [he is the husband of Adele Farai mentioned above]. They were intending to visit other victims and their families on behalf of Australian law firm, Slater & Gordon, which is investigating possible compensation claims in the Australian courts against Perth-based Anvil Mining.

The NGOs were taken by surprise when, just before their leased plane was due to take off, staff from the control tower at Lubumbashi airport informed them that they had received instructions from the intelligence services (*Agence Nationale de*

Renseignements – ANR) that their flight to Kilwa had been refused official clearance. According to airport officials, the Minister of Interior of Katanga province had issued an order requiring the group to obtain prior authorization from the Ministry before they could land in Kilwa. Yet the airline had already made two flights that day to Kilwa without being asked for prior authorization. On 2 April 2008, the activists were informed by the head of the Lubumbashi office of MONUC (the UN peacekeeping mission) that the Governor of Katanga had refused them permission to travel to Kilwa because of alleged insecurity in the area. Later the same day, the Governor, in a meeting with a representative of the airline, as well as the head of the UN Office for the Coordination of Humanitarian Affairs (OCHA), ordered them not to transport the human rights team to Kilwa.^{xiii}

The following day, two members of the human rights team received anonymous death threats, warning them to stop their work on the Kilwa case. They had to go into hiding for their safety.^{xiv}

9. Initiatives at the international level

In August 2007, the Australian Federal Police (AFP) closed the inquiry which had begun in September 2005, on the orders of the Australian Minister of Foreign Affairs, into the role of Anvil Mining and its staff in the events of October 2004. The AFP declined to respond to a request for clarification from Slater & Gordon, on behalf of the NGOs, regarding the scope and nature of the investigation.

In view of the failure of the Congolese system to deliver justice to the victims of the Kilwa events, ACIDH, ASADHO, Global Witness and RAID have called on the governments of South Africa and Canada to pursue investigations and possible prosecutions against their nationals named in the trial, and, in the case of Australia and Canada, against Anvil Mining as a corporate entity. As signatories to the Rome Statute, the governments of Australia, Canada and South Africa have made a commitment to investigating and prosecuting nationals who commit or are complicit in international crimes committed in foreign jurisdictions. However, at the time of writing, there is no indication that any of these governments are planning further investigations into this case.

ⁱ On 12 October 2006, the military prosecutor issued a “*décision de renvoi*” which combines the indictment and the decision to place the accused persons in the hands of a military trial court judge. A *décision de renvoi* indicates that the prosecutor has ended his investigation and concluded that there is sufficient evidence to support the charges. In the *décision de renvoi*, Anvil Mining Congo was cited. At the start of the trial, at a hearing on 27 December 2006, the military prosecutor, in response to a question from Anvil Mining’s lawyer, clarified that it was Anvil Mining’s agents who had been charged and not the company Anvil Mining as a moral person. Only in the event of Anvil Mining employees being found guilty would Anvil Mining the company be liable for damages.

ⁱⁱ Office of the High Commissioner for Human Rights, “High Commissioner for Human Rights Concerned at Kilwa Military Trial in the Democratic Republic of the Congo,” 4 July 2007, available at: <http://www.unhcr.ch/hurricane/hurricane.nsf/view01/9828B052BBC32B08C125730E004019C4?opendocument>.

ⁱⁱⁱ Letter from Leandro Despouy, Rapporteur spécial sur l’indépendance des juges et des avocats, to M. Antoine Mindua Kesia-Mbe, Ambassadeur extraordinaire et plénipotentiaire, Représentant permanent de la République Démocratique du Congo auprès de l’Office des Nations Unies à Genève, 26 September 2007 :

« *Récemment une tendance négative semble avoir émergé concernant la lutte contre l’impunité et l’indépendance du pouvoir judiciaire militaire...* »

^{iv} Despouy, 26 September 2007 (original French, translation by RAID and Global Witness): « Le verdict d’acquiescement de tous les accusés, militaires et civils, est également intervenu dans le cas du massacre du Kilwa, alors que de nombreuses preuves, dont notamment des témoignages oculaires, indiquaient de claires responsabilités dans ces événements tragiques. Il me semble également que l’indépendance des magistrats n’ait pas été respectée dans ce procès. L’Auditeur Supérieur qui a instruit et porté devant les juges le dossier a été rappelé à Kinshasa et réassigné à Kananga alors que le procès était en cours. Les irrégularités de ce procès ont été si manifestes, que la Haut Commissaire aux droits de l’homme, Mme Louise Arbour, a publié un communiqué de presse condamnant ce jugement. L’auditeur militaire ayant interjeté un appel, il est maintenant d’une importance capitale que le procès en appel se déroule de façon équitable, et que les magistrats concernés puissent juger en toute indépendance et uniquement sur la base de la loi applicable. Il est également essentiel que toutes les victimes et tous les témoins du massacre soient entendus par les magistrats : il me semble que seules des audiences foraines à Kilwa même peuvent permettre qu’ils soient tous entendus, afin qu’un verdict juste et équitable soit rendu. »

^v Global Witness, RAID, ASADHO, ACIDH press releases: “Three years on – still no justice for the victims of the Kilwa massacre”, 18 October 2007, and “Kilwa appeal should take place in Kinshasa to reduce the risk of political interference”, 5 December 2007.

^{vi} Testimony of Bupe Leopard concerning his cousin, Jean-Pierre Mugalu. Jean-Pierre Mugalu was allegedly killed by Colonel Ademar’s soldiers on 15 October 2004 after deciding to risk leaving the Kilwa hospital, where the rest of the family were hiding, in order to retrieve his school books from his home in the centre of town. Eye witnesses informed Bupe Leopard that his cousin’s body had been buried in an unmarked grave near the hospital.

^{vii} ASADHO letter to the First President of the High Military Court in Kinshasa, 29 January 2008.

^{viii} Mme Kabole Felicite, letter to the Clerk of the Military Court of Katanga, 18 December 2007, and Mr Kunda Musopelo, letter to the Clerk of the Military Court of Katanga, 18 December 2007. The letters were copied to the President of the High Military Court.

^{ix} Global Witness and RAID press release: “Military court of appeal succumbs to political interference in Kilwa trial”, 21 December 2007.

^x ASADHO press release No 004/AC/AS/AM/FD/2008, 31 January 2008.

^{xi} Katumba Mwanke was also a former member of Anvil Mining’s board and an advisor to President Joseph Kabila.

^{xii} Pierre Kunda Musopelo had been tortured while in detention in Kilwa. Dorcas, his 24-year-old daughter, who was seven months pregnant at the time, suffered a miscarriage and subsequently died after being gang-raped by soldiers.

^{xiii} ACIDH, ASADHO, Global Witness and RAID press release: “Human rights defenders prevented from meeting victims of Kilwa massacre”, 3 April 2008.

^{xiv} Amnesty International Urgent Action (AI Index: AFR 62/002/2008) UA 89/08, “Death threats/ Fear for safety”, 4 April 2008.